

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO.846 OF 2004
WITH
CIVIL APPLICATION NO.1153 OF 2004

Mr.Satish Hegde. ..Appellant.

V/s.

Mr.Shiv Prasad Sharma. ..Respondent.

Mr.Indu Prakash for L.K.Tripathi for appellant.

Mr.A.B.Khan for S.A.Shaikh for Respondent.

**CORAM: A.M.KHANWILKAR, J
DATE : JANUARY 18, 2006.**

P.C. :

1. Heard counsel for the parties. Perused the relevant material on record.

2. I see no infirmity in the conclusion reached by the Court below in rejecting the subject notice of motion for injunction taken out by the plaintiff, for the reasons recorded more particularly in paragraph No.16 to 18 which are founded on the evidence on record to show that the plaintiff had handed over possession of the disputed premises to the defendant before the institution of the suit. The court below has rightly found that at this stage, the evidence will have to be accepted as it is, for recording prima facie opinion, and there is no reason to

discard the said evidence which is on affidavit given by the independent witness. In other words, the factum of possession will have to be answered against the plaintiff for the time being.

3. To get over this position, counsel for the appellant contends that the fact that the lower court granted ad-interim order of injunction in favour of the plaintiff on 5th February, 2004 after hearing both sides, presupposes that at the relevant time the plaintiff was in possession of the disputed premises. Besides, that fact would falsify the affidavit filed. For the case made out by the plaintiff in the affidavit indicates that the appellant was not in possession of the disputed premises after First February, 2004. This submission clearly overlooks the case of the defendant. The defendant soon after the ad-interim order was passed on 5th February, 2004 moved an application being Notice of Motion No.494 of 2004 for setting aside the ad-interim order dated 5th February, 2004. In the affidavit in support of said notice of motion, specific case is made out by the defendant that he was served with the notice of the Notice of Motion filed by the Plaintiff which was moved for hearing on 5th February, 2004, on the previous night on 4th February, 2004. Therefore, he

did not get sufficient time to make necessary arrangement to engage an advocate or to give appropriate instructions in that behalf. He did appear in the court but he did not realise the consequences of the order which was being passed on that day. In other words, even if, the order sheet dated 5th February, 2004 indicates that the defendant was present in court, that will make no difference - because soon thereafter, the defendant has placed on record the relevant evidence to show that plaintiff was not in possession of the disputed premises on the date of institution of the suit. That finding, as reached by the court below in the impugned decision, needs no interference. Hence dismissed.

4. Needless to observe that the trial court will decide the suit on its own merits uninfluenced by any of the observations made in the impugned Judgment or the present order.

5. Civil Application disposed of accordingly.